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No. : 03-669

In the

Supreme Court of the United States

JOHN O'HARA,

Petitioner-Appellant,

-against-

THE PEOPLE OF THE STATE OF NEW YORK;
HONORABLE CHARLES J. HYNES,
DISTRICT ATTORNEY, KINGS COUNTY,

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE JUSTICE CARD ALLIANCE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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November 19, 2003

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Motion for Leave to File Brief As *Amicus Curiae*

This motion is made pursuant to Supreme Court Rule 37.2. Consent from the other parties has not been granted for the filing of this *amicus* brief; on November 18, 2003, Respondent, through ADA Leonard Joblove, contacted counsel for *Amicus Curiae* and refused consent to the filing of this brief.

The filing of this brief by the *Amicus Curiae* is for the purpose of assisting this Honorable Court with significant and serious issues of concern to the electors of the state that the parties hereto have failed to raise, to wit:

1-The criminalizing effect that the unconstitutionality of the election law statute at issue has on the citizenry that occupy non-traditional residences, who are disproportionately indigent, minority and increasingly, women with children.

2-The election law statute's unduly burdensome restraint on the right to vote violates the Equal Protection Clause where it disenfranchises the classification of citizens occupying non-traditional residences.

Amicus Curiae, Justice Card Alliance, Inc., is a State of New non-partisan but politically active not-for-profit organization, particularly watchful of criminal justice issues, which affect the minority communities.

Respectfully submitted,

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BRIEF OF THE JUSTICE CARD ALLIANCE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Justice Card Alliance, Inc. respectfully submits this brief as *Amicus Curiae* in support of the Petitioner in accordance with the Provisions of Supreme Court Rule 37.2.[1]

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[1] Amicus certifies that no counsel for a party authored this brief in whole or in part, nor has any person or entity, other than Amicus or its counsel, made a monetary contribution to the preparation or submission of this brief.
Norma A. Roper, Hunter College pre-law student contributed to this brief.

INTEREST OF AMICUS CURIAE

Who are to be the electors...? Not the rich more than the poor, not the learned, more than the ignorant, not the haughty heirs of the distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.
The Federalist No.57 (J.Madison)

The Justice Card™ was created in conjunction with Justice Card™ Hotline, for the NAACP-Brooklyn Branch, as a result of the tragic death of the African immigrant, Amadou Diallo, in order to educate the public, particularly the youth in the high crime areas of Brooklyn, as to their rights when stopped or arrested by the police.} Its objective was to prevent such tragic shootings that severely damage and further erodes the very fragile relationship between the police and the Black and Latino communities.

Justice Card, Inc. (hereinafter, JCA)[2] was then incorporated as a New York State not-for-profit corporation with the purpose:

> To educate, enlighten and empower the community, particularly the youth and their parents as to the role, function and responsibility of the justice system: The ultimate goal, being to enhance society, at large, by aiding in the decrease of the incarcerated, particularly youth, and increasing the number of productive members of the community.
>
> To educate the youth on the inner workings of

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[2] Justice Card™ and Justice Card™ Hotline established 1999; JCA incorporated 2002

the criminal justice system, with a focus to avoid arrests, incarceration, wrongful arrests, wrongful incarcerations and indictments, bearing in mind that with each arrest there's an exponential proportional decrease in the youth's future economic potential and success as a productive member of society.

JCA is non-partisan but politically active, particularly with an emphasis on criminal justice issues. One of its fundamental goals is increased voter participation, particularly targeting the minority and new American[3] and the just-turned-18 population. To encourage voter participation in the electoral process, will help to promote various JCA initiatives, such as the repeal of the Rockefeller Drug} Laws, with JCA's ultimate goal of decreasing from this population in the criminal justice system.

JCA has an interest in the outcome of the case before this Honorable Court because of the serious and significant impact that the underlying case has upon our most fundamental of rights, our First Amendment freedom of speech as expressed in the right to vote and the attendant right to run for elective office. This Court's grant of *writ of certiorari* in this case of ***First Impression*** is vital to providing security to the citizens

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[3] In furtherance of the goal to increase voter participation by naturalized immigrants, founder of JCA organized a massive and comprehensive citizenship drive in September, 1995 prior to the impending federal amendments to the immigration laws to become effective, October 1, 1995 with corresponding voter registration of the new Americans. In addition, JCA's founder has also petitioned and advocated Congress to legislatively provide an automatic removal of the civil disability of a convicted felon's inability to vote, upon completion of their sentence.

seeking to exercise this right because the lower court's decision in its current form chills the exercise of our right to vote, the bedrock upon which our democratic form of government is based. This case requires this Court's review in that where the challenged statute's unconstitutionality and uncertainty be allowed to stand, faces voters, particularly low income voters, with the risk of criminal charges after the exercise of their right to vote thereof, with the attendant revocation of her liberty through incarceration, as well as the imposition of the civil disability-revocation of a convicted felon's right to vote altogether.

Such is the irony, that the exercise of the right to vote be the cause of the ultimate loss of that very same right.

JCA is well situated to provide this Honorable Court with additional insight into the issues presented in this case.

STATEMENT OF THE CASE

The core question at issue in this case is whether New York State Election Law Section 1-104(22) is unconstitutional, as it requires that for voting purposes, a residence shall be "permanent". This effectively disenfranchises those citizens in non-traditional residences, who are statistically predominantly, the indigent and minority, and, by opening up another avenue by which to increase criminality as a result of the exercise of the most fundamental of rights-the right to vote.

This is a case of ***First Impression***, being the only criminal conviction for voting in our nation's history since Susan B. Anthony's civil disobedience protest in 1873 during the Woman's Suffragist Movement. After being tried three times, Petitioner, a political dissident, was convicted of one count of false registration (Election Law §17-104(4)), one count of offering a false instrument for filing (P.L. §175.35),

and five counts of illegal voting (Election Law §17-132(3)). The essential element of each count was that Petitioner chose the wrong one of his 2 residences from which to register to vote because that residence was found not to be a legal "residence" under the Election Law. Election Law, which §1-104(22), defines "residence" as *"that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return."* The Petitioner[4] maintained that inasmuch as he had legitimate, significant and continuing attachments with both residences, in accordance with New York seminal cases he was legally entitled to choose either of his 2 non-traditional residences as his voting address.[5] However, the trial court's jury charge was effectively the literal reading of Election Law Statute Section

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[4] The Petitioner herein maintained non-traditional residences in that he had 2 residences to which he had physical presence and an intention to remain for the time at least.

[5] *Matter of Gallagher v. Dinkins,* 41 A.D.2d 946, 343 N.Y.S.2d 960 (2nd Dep't 1993) aff'd 32 N.Y.2d 839, 346 N.Y.S.2d 268, 299 N.E.2d 681 (1973) and See, *Matter of Ferguson v. McNab,* 60 N.Y.2d 598, 467 N.Y.S.2d 192, 454 N.E.2d 532. *In Matter of Gallagher v. Dinkins,* the rule of law was stated as follows:

> There is no rule which prohibits a candidate for public office from having two residences; and, where the record is clear, as at bar, that both residences are places where he maintains significant and legitimate attachments, it is for him to decide which address he considers as his voting address.

Id.,41 A.D.2d at 947, 343 N.Y.S.2d at 961. In *Matter of Ferguson v. McNab*, New York's Highest Court stated: "Respondent candidate having two residences may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law." *Id.,* 467 N.Y.S.2d at 193, 60 N.Y.2d at 600, 454 N.EW.2d at 533.

1-104(22), which has been found unconstitutional. The state courts and the courts below in this instant case failed to rule on the constitutionality of this statute charged to the jury, but rather ruled on the 6th Amendment issues as to ineffective assistance of counsel.

JCA argues that the statute upon which this conviction is based is unconstitutional and where, as here, it is being used as the basis of a criminal conviction, *for the first time*, it is imperative that this Honorable Court so rule this statute unconstitutional, and this state's definition of residence be brought into constitutional compliance so as not to disenfranchise those living in non-traditional residences. Particularly of note, this state's board of elections has no formal written policy for those citizens living in non-traditional residences, who statistically, are the indigent minority who live nomadic lives due to financial hardship. It is indeed abhorrent to the administration in our criminal justice system that a citizen may be denied her liberty through the device of an unconstitutional statute. At a minimum due process demands precision and predictability. Election Law Statute 1-104 fails in this regard and so must be once and for all time deemed unconstitutional. The uncertain current state of the law where the courts have stated that although the statute is unconstitutional, we will leave it to the courts on a case-by-case basis[6] is untenable where criminal prosecution is a result thereof.

JCA fears that where the precedent herein be allowed to stand, there results significant potential injury to the citizenry of the state. Further, this definition of residence will not only have the effect of disenfranchising voters in this State, but will

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[6] *Levy v. Scranton,* 780 F. Supp. 897 (N.D.N.Y. 1991)

serve to directly discourage voting and running for office. Not only does the precedent established by the rulings of the Courts below threaten to deter the many voters of this State's indigent and minority ambulatory citizenry with non-traditional residences, from participating in the electoral process, by failing to vote or by failing to run for office from the residence of their choice, but it also inflicts upon the voters of the state the real threat of criminal prosecution. This is particularly true in the minority and immigrant communities. Not only must the voter be concerned with, who to vote for, but from where to vote and where to register, and the wrong choice could have life-destructive consequences, of arrest and conviction of a felony, which is already a serious criminal justice and human rights issue in these communities, particularly with the youth.[7]

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[7] *Footnotes,* a New York City journal published bi monthly, conducted a survey in minority and immigrant communities of Central Brooklyn, New York City, January, 2003, and found:

> ...one out of every 12 voters who went to the polls in September and November committed the exact crime that John O'Hara was convicted for. And when we narrowed that poll to Crown Heights, East Flatbush, Bed-Stuy and Prospect Heights, our statistics showed one out of every 7 voters was guilty of O'Hara's "crime. ... If you are reading this article, and voted in September or November, there's a good chance that Brooklyn District Attorney Joe Hynes could convict you of a felony if he chose to... The District Attorney can go back 5 years and charge you for each of the times you voted. So, if you're one of those "prime" voters who votes in Primaries, General Elections, Special Elections and School Board Elections, you could be charged as many as 14 felonies within 5 years.... The last time anyone was convicted for these offenses was in 1876. And that was Susan B. Anthony, a champion for Women's right to vote. ...John O'Hara was not even a candidate. He was an ordinary voter [sic, like you and me]. Ordinary voters are never charged with false registration until

The potential impact of this case precedent on young people, many of whom have, or are likely to have, encounters with the criminal justice system is particularly troubling.

Of further concern, is the chilling effect on those who would otherwise run for elective office, but for fear of criminal prosecution, where their manifest intent to reside in a particular voting district is considered wrong after the fact, pursuant to this unconstitutional statute. Judge Rosenblatt, dissenting in the highest state court's opinion in this case, found that Petitioner's case is a "unique one" in that it was a criminal prosecution as opposed to merely a civil election matter.[8]

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now. ... And because of the John O'Hara precedent, hundreds of thousands of voters could be facing, felony charges today or tomorrow or next week. It's a serious matter...

[8] *People v. O'Hara,* 2001 WL 670112 Fn2 (N.Y. 2001)

Indeed troubling to JCA, is that it appears that this criminal conviction could have been politically-charged, as a matter of selective prosecution against a political dissident by powerful adversaries of the voting district's reigning political party. Even a mere implication of such, is abhorrent to our form of government.

Petitioner had been a political dissident, never winning, but at least providing a voice for debate and discussion on the issues to otherwise uncontested races against the very powerful Brooklyn Democratic Party Machine. The fact that Petitioner, under-funded and with very little probability of actually winning, sought to mount a campaign, nevertheless brought spirited debate on the public issues of concern, which otherwise, would have remained mute. This is of benefit to the electors and polity.

JCA believes that we tread very dangerous ground that undermines the very foundation upon which our union was formed, freedom of speech, where a citizen who decides to raise issues of public concern and promote debate as an insurgent candidate could be penalized through criminal prosecution by a powerful and politically entrenched adversary, who is endowed with powers bestowed upon that adversary by the electorate.

As Court of Appeals Judge Rosenblatt further states,

> If politically-charged disputes such as this and questions of "residence" are going to be resolved in the criminal arena and decided by

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Where that adversary is allowed to abuse those bestowed powers to eliminate his opponents, by not merely removing that insurgent candidate from the ballot in a civil action, but rather destroying them through a criminal prosecution, will have a significant chilling effect on prospective candidates' free speech.

During the pendency of this matter, there has been media reports which links this case to further politically-charged indictments by the prosecutor herein. Such New York State notables, as former Senator Alfonse D'Amato, Republican, and former Mayor Edward Koch, Democrat, have stated that the prosecutor herein is "out of control", his conduct an "abuse of power" and "not prosecution, it's persecution" in bringing criminal charges for matters that actually are run of the mill civil election matters for political expediency. *New York 1 – Inside City Hall 10/20/03; New York Times, 10/12/03; New York Daily News, 10/12/03; Newsday 10/12/03; and New York Post 10/12/03.* This is the rare criminal case brought to eliminate a political insurgent, with no power, no money, and merely a will to promote dialog amongst the citizenry. It may be the only one where the crime in question is voting. Such abuse of power should not be tolerated in a free society.

On Primary Day, September 9, 2003, the New York Daily News Editorial Board opined:

> It isn't just about ballot access at stake. People could be thrown in jail for voting from an address that the courts won't accept. In her ruling, the judge [*sic*, J. Dabiri] cited as precedent, the case of John O'Hara, a Brooklyn Democratic Activist, who was convicted on 7 felony counts for voting.

JCA proselytizes citizen participation in voting and running for elective office. Thus, JCA issues a very strong and passionate request to this Honorable Court of last resort that there be a very strong message sent here that even the slightest implication of criminal prosecution for political expediency would not be tolerated.

> juries, with the possibility of criminal conviction and incarceration, we would ensure that the definition of residence is plainly fixed and easily understood.[9]

JCA believes that it could be of assistance to this Court in demonstrating the very serious impact this holding has on the citizenry of this State having non-traditional residences generally because of financial hardship, who are statistically predominantly minorities. Much of the case law has previously dealt with the learned and successful, i.e.- a law professor and college students, as fully discussed, *infra*. JCA here offers a voice to the presently voiceless on this issue of non-traditional residences for the purposes of exercising their right to vote. This state's definition of residence, for those who live nomadic, ambulatory lives in non-traditional residences, must pass constitutional muster and not be allowed to have a chilling effect on our most basic of fundamental rights, the freedom of speech as expressed through a citizen's vote or candidacy for elective office through threat of criminal prosecution.

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[9] *People v. O'Hara,* 2001 WL 670112 Fn2 (N.Y. 2001)

REASONS FOR GRANTING THE WRIT ARGUMENT

I. NEW YORK STATE ELECTION LAW §1-104(22) DEFINITION OF RESIDENCE IS UNCONSTITUTIONAL

A. The Strict Statutory Standard of Review For Restraints On The Right To Vote

Where a statutory restraint on a residence requirement for voting purposes is not necessary to further a compelling state interest, it has been found to be unconstitutional in that it violates the Fourteenth Amendment. *Dunn v. Blumstein,* 405 U.S. 330, 336-337 (1972). To survive strict constitutional scrutiny, the restrictions imposed by such a statute must advance a compelling governmental interest by the least drastic means. *See, e.g., Dunn v. Blumstein,* 405 U.S. 330, 336-337 (1972). Absent a compelling state interest, a state may not statutorily restrain the right of a resident to move from one jurisdiction to another. *Id.* Accordingly, the definition of residence in New York State Election Law 1-104 is unconstitutional where it denies the right to choose of non-traditional residences, effectively disenfranchising those who live on a park bench or on a church's stairs when warm or at a subway station when it becomes cold, or between a friend and a family member's home, to which they have physical presence with intent to remain for at least the time being.

The right to vote is an expression of our most basic of rights, freedom of speech, unquestionably a fundamental right. As the Supreme Court states in *Wesberry v. Sanders,* 376 U.S. 1, 17-18 (1964):

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Accordingly, where a statute places restraint on a person's right to vote, the statute is subject to strict constitutional scrutiny. *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Board of Elections*, 383 U.S. 663 (1966), *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 709 (1969); *Evans v Cornman*, 398 U.S. 419 (1970); *Phoeniz v. Kolodziejski*, 399 U.S. 204 (1970).

These principles were reiterated and reinforced in *Dunn v. Blumstein,* 405 U.S. 330, 336-337 (1972), a law professor who was denied the vote because of the move to another geo-political district, where the Supreme Court made it unquestionably clear that all substantial restrictions upon the right to vote, including the imposition of "residence requirements", must be closely scrutinized in constitutional terms:

> In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. *See, e.g., Evans v. Cornman,* 398 U.S. 419, 421-22, 426 (1970); *Kramer v. Union Free School District No. 15,* 395 U.S. 621

> (1969); *Cipriano v. City of Houma,* 395 U.S. 709 (1969); *Harper v. Board of Elections,* 383 U.S. 663 (1966), *Carrington v. Rash,* 380 U.S. 89 (1965); *Reynolds v. Sims, supra.* This 'equal right to vote', *Evans v. Cornman, supra,* 398 U.S. at 426, is not absolute; the States have the power to impose qualifications, and to regulate access to the franchises in other ways. *See, e.g., Carrington v. Rash, supra,* 380 U.S. at 91, *Oregon v. Mitchell,* 400 U.S. 112, 144 (opinion of Justice Douglas), 241 (opinion of Justices Brennan, White and Marshall), 294 (opinion of Justice Stewart, in which Chief Justice Berger and Justice Blackmun joined). But as a general matter, 'before the right [to vote] can be restricted, the purpose of the restriction and that assertedly overriding interests served by it must meet close constitutional scrutiny.' *Evans v. Cornman,* 398 U.S. 419, 422 (1970); *see Bullock v. Carter,* 405 U.S. 134 at 143 (1972).

Election Law § 1-104(22), the cornerstone of the court's charge on residence in the instant case, clearly places restraint and abridges a citizen's right to vote. Because the statute requires a voting address to be a "permanent" home and the place to which a person "always intends to return", persons living in non-traditional residences are effectively disenfranchised. The body of case law makes clear that this state's restriction renders this statute unconstitutional on its face.

The United States Court of Appeals examined whether a state could require a voting address to be a "permanent" home in a case concerning the rights of college students to vote from

their dormitory rooms. The court concluded such a requirement was unconstitutional, stating:

> The District Court correctly noted that, as a matter of state law, this definition -- particularly the requirement that the home be "permanent" -- should not be read literally but rather "is intended to approximate the test for domicile, i.e., physical presence and an intention to remain for the time at least."

Auerbach v. Rettaliata, 765 F.2d 350,351 (2nd Cir. 1985)(citations omitted).

Justice Friendly stated in the majority opinion: "[W]e think the only constitutionally permissible test is the one which focuses on the individual's present intention and does not require him to pledge allegiance for an indefinite future:

> We think therefore that, in determining bona fide residence for a person physically present, the state cannot constitutionally go further than the test set out in the Restatement (Second) of the Conflict of Laws § 18 (1971), namely, that he **"must intend to make that place his home for the time at least."**

Ramey v. Rockefeller, 348 F. Supp. 780 at 788 (E.D.N.Y. 1972).

Auerbach v. Kinley, 594 F. Supp. 1503, 1507 (N.D.N.Y. 1984) further examined this issue of permanence, in which again the rights of college students to vote from their dormitory rooms were at issue. Relying on *Ramey v. Rockefeller,* the Court found:

> The word "permanent" as used in the statute is not meant to be taken literally, but rather, is intended to approximate the test for domicile, i.e. physical presence and an intention to remain for the time at least. In discussing this point New York Jurisprudence states: "To satisfy constitutional requirements the test of a student's intention to remain in a college community must focus on his present intention; he is not required to pledge that he will remain permanently or indefinitely.*18 N.Y. Jur., Elections @ 145 at 195 (1979).*

Id. at 1507, n5

Further, in *Levy v. Scranton,* 780 F. Supp. 897 (N.D.N.Y. 1991), again the Court, examining the rights of college students to vote from dormitory rooms, found:

> Several courts in this Circuit, and the Court of Appeals itself, have recognized that such a literal reading of this definition would be an unfair and unconstitutional interpretation of the word "residency." Therefore, these courts have given section 1-104(22) a much broader construction enabling them to save the statute from constitutional invalidity.

780 F. Supp. at 902 (emphasis added).

The body of case law makes clear that a literal application of Election Law § 1-104(22) is both unfair and unconstitutional. A State simply cannot require a voting address to be "permanent", a requirement that is inconsistent

with the ambulatory society in which we live, and that is especially punitive to forced moves because of financial hardship. *Wit v. Berman*, 306 F.3d 1256 (2002). It is well-settled law that the state can go no further than to require a voting address to be a place where a person physically lives and intends to remain for at least the time being. This is where the New York State statute runs afoul of the constitutional standards for restraint or abridgement on the voter's rights, particularly in a criminal prosecution based upon said statute. The statute deprives the voter of her intent to remain for at least the time being, where it requires permanency. The constitutional violation is in failing to provide for the right to choose of non-traditional residences that cannot comport to the definition of permanence.

B. The 14th Amendment Classification of voters living in non-traditional residences are disenfranchised by the unduly burdensome statutory restraint, which violates The Equal Protection Clause

In *Ramey*, citing *Dunn v. Blumstein*, the Court ruled that the meaning of this election law provision on residence remains uncertain. Surely, to require a permanent home where one always intends to return is too restrictive particularly with the ambulatory nature of our society, particularly in the urban areas, where the housing crisis has resulted in many sorts of non-traditional residential arrangements- such that, a low wage earning working single mother of 5 who was evicted from her apartment, refuses to expose her children to the homeless shelter environment, and rather opts for a more civilized quality of life by alternatively staying with a family member and a friend. Since no one person can accommodate her 6 member

family all at one time, the mother leaves the 2 older children with one family member and 2 younger children in a friend's home. The mother is then relegated to going back and forth between both places, with her youngest, a toddler, in tow. She alternatively sleeps at either of the residences, depending on the circumstances from day to day of that family or friend. This scenario is more common than we would like to admit. This is not the quality of life that she desires for her family, but her financial circumstances are such that she has no choice, but to live under these non-traditional residential arrangements, which are absolutely not permanent, nor ideal, but are certainly better than the alternative, having her children sleep on the unsanitary and overcrowded floors of a homeless shelter. The mother is on a 2-year waiting list for Section 8 subsidized housing and indeed is desirous of permanent housing to accommodate her entire family. This single mother with children, who often times is not on public assistance, but rather low-level wage earners, would be criminalized where she votes from either the friend's or the family member's home where she alternatively has physical presence with an intent to remain for at least the time being, pursuant to the literal reading of the statute.

What happens next- this woman with her 5 children in the non-traditional living arrangements usually lasts much longer than they would like- the intent being to find immediate permanent housing with re-unification of the family. She doesn't, so she chooses to vote from the friend's address, as opposed to her family's address. She votes in the primary and the general election in 2 years, for a total of 4 times, so she then is susceptible to criminal liability of 1 count for filing false registration and 4 counts of illegal voting over a 2 year period because indeed neither the friend's of the family's residence where she stays is permanent because she is on the waiting list for Section 8 subsidized housing. One day, as in the instant

case, the police comes knocking on that friend's door and arrests that mother because she has indeed violated the literal reading of Election Law Sec. 1-104(22). This is the real-life scenario of those who are harmed by this statute not being brought into constitutional compliance.

Should that voter be the subject of criminal charges because of already strained unfortunate financial circumstances? Because those in non-traditional residences decide to exercise their right to vote as good citizens from either of those non-traditional residences, should they be punished with criminal prosecution?

These families who comprise this class of persons disenfranchised by the unconstitutional statute, are overwhelmingly indigent minority in non-traditional residences, who are already plagued with disproportionate statistical incidences of criminality (as with the unduly draconian Rockefeller Drug Laws against those non-violent drug offenders, usually addicted substance abusers- who again are disproportionately minority and particularly, minority women with children).

C. The Remedial Cure

JCA believes that the statute may be brought into constitutional compliance, where the statutory definition of residence be purged of the requirement of permanence to be replaced by language as used in the body of case law- physical presence with intent to remain at least for the time being. Where a citizen has more than one place to which she has physical presence with intent to remain for at least the time being, then she may choose from either of those residences to which she may register to vote, vote or be candidate thereof.

The overriding interest of a statutory residency requirement is to prevent fraud. *Dunn v. Blumstein,* 405 U.S. 330, 336-337 (1972), but, if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose the less drastic means. *Id.* It is indeed important that the state has an interest in the prevention of fraud, but in this technologically advanced era, there are much less restrictive methods to ensure against fraud, such as dual voting, while still complying with the constitutional standard as enunciated by Honorable J. Marshall in *Dunn v. Blumstein.*

The codification of the case laws' standard as enunciated would indeed cure the abyss that exists for the class in non-traditional residences. The constitutionally viable standard for residence should be physical presence with intent to stay for at least the time being.[10]

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[10] On November 18, 2003, it was reported that the board of elections planned to carry out a massive purging of hundreds of thousands of voters, "many of who are temporary residents [*sic*, with an intent to remain for at least the time being] who will return to another address", from the voters rolls based upon this state's unconstitutional definition of residence. *The New York Sun, 11/18/03.*

CONCLUSION

That class of citizens disenfranchised by the present holding of this case, have no idea that over them looms an additional burden with such serious and further life-altering criminal implications thereto. For all the foregoing reasons, JCA is compelled to intervene to give a voice to those citizens in non-traditional residential arrangements and respectfully, but urgently requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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